GUIDELINES ON THE ASSESSMENT OF HORIZONTAL MERGERS AND ACQUISITIONS

1. INTRODUCTION

(1) Article 7 of the Act no 4054 on the Protection of Competition (the Act no 4054) prohibits merger by one or more undertakings, or acquisition by any undertaking with a view to creating a dominant position or strengthening its/their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country. "Communiqué concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board" specifies mergers and acquisitions calling for the authorization of the Competition Board in order to be valid according to article 7 of the Act no 4054 and the procedure and principles about the notification of such transactions.

(2) The concept of dominant position is defined in article 3 of the Act no 4054 as the power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers. Within this framework, preliminary assessments should be made regarding whether undertakings, individually or jointly, will reach the power level indicated by the concept of dominant position or increase such power as a result of a merger or an acquisition in a particular market for goods or services.

(3) The aim of this guideline is to demonstrate the general principles to be taken into account by the Competition Board in preliminary assessments concerning mergers and acquisitions.

(4) In competition law, mergers and acquisitions between actual and potential competitors in the same relevant product markets are defined as *horizontal mergers and acquisitions.*[1]

(5) Hereafter, the term merger is used to cover the meaning of the term acquisition in order to avoid repetition and facilitate reading.

[1] In competition law, mergers and acquisitions between actual and potential competitors in different relevant product markets are defined as *non-horizontal mergers and acquisitions.*

(6) Consumers benefit from efficient competition in several ways, some of which are low prices, high quality products and a wide selection of products and services. As a result of creating or strengthening dominant position in markets, one or more undertakings would be able to profitably increase prices, reduce the amount of production, choice or quality of goods or services or diminish or delay innovations. In this guideline, the expression "high price" is generally used to reflect all those possible negative effects of mergers.

(7) Both suppliers and buyers may create or strengthen a dominant position. However, this guideline analyzes mainly creation or strengthening a dominant position by suppliers. Where the assessment is particularly related to buyers, the term "buyer power" is employed.

(8) In assessing the competitive effects of a merger, pre-merger competitive conditions in relevant markets are compared with those that are expected to occur after the merger. In most cases, the situation existing at the time of the merger enables relevant comparison; however, in some circumstances some changes to the relevant market that are expected to occur in future are taken into account. A similar approached is adopted in the assessment of mergers realized without the authorization of the Board. In those assessments, the effects of likely entry to or exit from the market that are not related to the merger as well as regulations to be effective in near future are taken into account.

(9) The assessment of mergers by the Board mainly entails two phases: (a) defining the relevant product and geographic markets (b) assessing the effects of the merger on competition. The main purpose of defining the relevant market is to identify undertakings that can exercise competitive pressure on each other. Details on this issue can be found in "the Guidelines on the Definition of the Relevant Market", issued by the Board.

(10) This guideline covers an introduction and the following sections:

(a) The approach of the Board to market shares and concentration levels

(b) Anticompetitive effects that are likely to be created by the merger in the relevant market

(c) Buyer power as a countervailing factor against the anti-competitive effects created by the merger

(d) The role of market entry in maintaining effective competition in relevant markets

(e) Efficiency gains from the merger as a countervailing factor

(f) The conditions for a "failing firm defense".

(11) Beside anti-competitive effects of a merger, the Board considers countervailing factors such as buyer power, entry barriers and possible efficiency gains to be produced by the transaction. In exceptional circumstances, failing firm defense may also be taken into account.

(12) However, those factors should not be interpreted as a checklist. In other words, it is not necessary for the Board to analyze all of those factors separately in each assessment. Depending on the nature of the transaction subject to assessment, while some of those factors may be critical, others may be irrelevant and omitted from the analysis.

2. MARKET SHARE AND CONCENTRATION LEVELS

(13) Market shares and concentration levels are first indications of important information about market structure and competition between merging parties and other undertakings.

(14) The Board considers actual market shares in its competitive assessment about the effects of the transaction concerned on the market. However, it may also consider shares different from actual market shares taking into account some changes very likely to happen (for instance entry to or exit from the market or the growth in undertakings' shares). Market share of the new undertaking created after the merger is calculated by adding the pre-merger market shares of undertakings creating that undertaking. In case market shares are volatile (such as orders given in large amounts), historic data covering a certain time period are used instead of short term data. The time period to be analyzed may change depending on the characteristics of the relevant market. Historic changes in market shares may provide information about competitive dynamics in the market (such as whether undertakings would gain market power after the merger or whether the market is stable in terms of innovation and growth).

(15) The concentration levels in a market provide useful information about the competitive structure. In order to calculate concentration levels, concentration rate (CR4, CR5, etc.) or HerfindahlHirschman Index (HHI) or other measures can be used.

(16) HHI is calculated by summing the squares of the market shares of each firm in the market. This index gives greater weight to undertakings with larger shares in the market. Although it is necessary to include the shares of all undertakings in the market in the calculation of the index, in case there is a lack of information, undertakings with small market shares may not be included in the calculation because such small firms do not affect index size significantly. While the post-merger absolute value of the HHI is an initial indication of competitive intensity in the market, the change in the concentration level caused by the merger concerned is reflected by the change in this index. For instance, HHI would be 3.800 in a market where three undertakings whose market shares are 50%, 30% and 20% respectively, operate.[2] In case the two biggest undertakings merge, HHI would increase to 6.800[3] and the change in HHI would be 3.000.[4]

2.1. Market Share Levels

(17) Very large market shares (for instance more than 50 %) may be used as an indication of the existence of a dominant position. However, other small firms in the market can exercise competitive pressure on the undertaking with a large market share if they have the ability and incentive to increase their amount of sales. Even where the total market share of merging parties is lower than 50%, competitive concerns may arise. In those cases, the factors such as the number and strength of other undertakings in the market, whether they are exposed to capacity constraints or whether the merging parties are close competitors are considered. Even if total shares of the merging parties are lower than 40%, the new undertaking may be found to have a dominant position regarding such factors.

(18) In case the sum of the merging parties' shares in the relevant market is lower than 20%, it can be presumed that the merger's negative effects on competition are not so significant to require an in-depth investigation and prohibition of the merger.

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[2] $(50)^2+(30)^2+(20)^2=3.800$

[3] $(80)^2+(20)^2=6.800$

[4] 6.800-3.800=3.000

2.2. HHI Levels

(19) It is unlikely that competitive concerns will arise in transactions where post-merger HHI is lower than 1.000 and in most cases, the Board does not intervene in such transactions.

(20) Except for the following cases, it is unlikely that competitive concerns will arise in transactions where post-merger HHI is between 1.000 and 2.000 and the change in HHI is lower than 250 or post-merger HHI is over 2.000 but the change in HHI is lower than 150 in the market. Factors that are likely to create competitive concerns in such markets are:

(a) One of the merging parties is a potential entrant or a recent entrant with a small market share

(b) Some of the merging parties are innovators in ways not reflected in market shares

(c) There are cross-shareholdings among the market participants

(d) One of the merging parties is competitive in a way that it may disrupt anti-competitive cooperation between market participants although it has small market share (the existence of a maverick firm)

(e) Existence of past or ongoing anti-competitive cooperation between market participants or practices facilitating such cooperation

(f) One of the merging parties has a pre-merger market share of 50% of more

(21) These HHI levels and HHI change values are initial indicators of the possibility that competition concerns will arise as a result of the transaction concerned and they are not taken as a certain conclusion that competitive concerns exist.

3. POSSIBLE ANTI-COMPETITIVE EFFECTS OF HORIZONTAL MERGERS

(22) Horizontal mergers may significantly decrease competition by creating or strengthening a dominant position in two main ways:

(a) Within the context of unilateral effects, creating or strengthening a dominant position as a result of the elimination of important competitive pressure on one or more undertakings (single dominant position)

(b) Changing the nature of competition in the relevant market, undertakings that previously were not coordinating their behavior, significantly impede competition by making coordination (joint dominant position). Such merger, may make existing coordination between undertakings in the relevant market easier, more stable or more effective compared to pre-merger conditions.

3.1. Unilateral Effects

(23) For the purposes of these guidelines, unilateral effects do not cover unilateral effects in non-coordinated oligopolies but refer to unilateral effects occurring as a result of creating or strengthening single dominant position so as to significantly decrease competition because a merger may cause an increase in prices without creating or strengthening a single dominant position or leading to coordinated effects. This type of effects is called unilateral effects in non-coordinated oligopolies.

(24) A merger may significantly impede competition by eliminating important competitive pressure on an undertaking and therefore creating market power. The first direct effect of this transaction is the loss of actual competition between the merging parties. For example, prior to the merger, if one of the merging undertakings raises its prices, some of its sales will be lost to the advantage of other party. Moreover non-merging undertakings in the same market may also benefit from the reduction of competitive pressure as a result of the merger because in case of post-merger price increase, some demand will be switched to competing undertakings and it may be profitable for non-merging undertakings to increase prices. This reduction in competitive pressure may lead to significant price increases in the relevant market.

(25) A merger giving rise to such unilateral effects would significantly impede competition by creating or strengthening the dominant position by the undertaking which would have an appreciably larger market share than its closest competitor.

(26) There are a lot of factors that determine whether a merger will lead to unilateral effects that will significantly impede competition in the relevant market. Those factors may not be decisive when taken separately; therefore, they should be evaluated together. However, not all of these

factors need to be present to prove the existence of such unilateral effects. Examples of such factors are given below; however they are not limited to those.

3.1.1. Merging Parties have Large Market Shares

(27) The larger the market share an undertaking has, the more likely it is to possess market power. The higher the increase in the market share is, the higher the merger will lead to an increase in market power. The larger the rise in the sales base where higher margins are obtained after a price increase is, the more likely it is that the merged firm will find the price increase profitable despite the reduction in the amount of production. Market shares and increases in market shares are important first indications of market power and increases in market power.

3.1.2. Merging Parties are Close Competitors

(28) In relevant markets of differentiated products[5], some products are closer substitutes for each other than others. The higher the degree of substitutability between the merging parties' products is, the more likely it is that the merged undertaking will raise prices significantly. For example, a merger between two undertakings whose products are regarded first and second choices by a substantial number of consumers may lead to a significant price increase. In such case, competition between the merging parties will be in the center of the analysis as it is an important source of competition in the relevant market. Besides, high pre-merger profit margins[6] also make significant increases in price levels more likely. The merged undertaking's incentive to raise prices will be constrained in cases where the substitutability of competing undertakings' products with the merging undertakings' products is high. Therefore, the higher the degree of substitutability between the products of the merged undertaking and the products of competing undertakings is, it is less likely that the merger concerned will significantly decrease competition by creating or strengthening a dominant position.

[5] Products in a market may be differentiated in many ways. For example, differentiation in terms of geographic location is important for retail sales channels, banks, travel agencies, or petrol stations. Similarly, differentiation may be based on brand, image, technical specifications, quality or level of service. The level of advertising expenditures in a market is an indicator of undertakings' effort to differentiate their products.

[6] Generally, the relevant margin (□) refers to the ratio of the difference between price (p) and costs incurred for producing one more products (c) and price [□=(p-m)/p]

(29) In case the relevant data are available, the degree of substitutability between products may be evaluated via customer preference surveys, analysis of purchasing patterns, estimation of the cross-price elasticities of the products concerned[7] or diversion ratios[8]. With respect to bidding markets, it is possible to analyze whether the bids submitted by one of the merging parties in the past exerted competitive pressure on the bids of the other party.

(30) In some markets it is relatively easy and less costly for undertakings to reposition their products or extend their product range. In particular, how repositioning or product range extension by merged undertaking or competitors may influence price increase by the merged undertaking should be analyzed. Moreover, product repositioning or product range extension is mostly less profitable than the current conditions as it involves high sunk costs and risks.

3.1.3. Customers Have Limited Possibilities of Switching Supplier

(31) Customers of the merging parties may have difficulties switching to other suppliers because there are few alternative suppliers or because switching to other suppliers requires incurring substantial switching costs. Such customers are particularly vulnerable to price increases. The merger may weaken these customers' ability to protect themselves against price increases. In particular, this may be the case for customers that use both merging undertakings as a source of supply for obtaining competitive prices. Past customer switching patterns and reactions to price changes may provide important information in this respect.

3.1.4. Competitors are Unlikely to Increase Production in Response to Price Increase

(32) When market conditions are such that the competitors of the merging parties are unlikely to increase their supply substantially in response to prices increase, the merged undertaking may have an incentive to reduce the production amount below the combined pre-merger total production amounts of the parties, thereby raising market price. The merger provides an

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[7] The cross-price elasticity of demand measures the extent of change in a product's demand in response to a change in the price of another product, all other things remaining stable. The price elasticity of demand measures the extent of change in a product's demand in response to a change in its price. The diversion ratio from product A to product B is the proportion of the sales transferred to product B due to a price increase in A to the total loss in the sales of product A.

[8] The diversion ratio from product A to product B is the proportion of the sales transferred to product B due to a price increase in A to the total loss in the sales of product A.

incentive mechanism for the merged undertaking to reduce the production amount by giving it a larger base of sales where higher margins resulting from an increase in prices induced by the output reduction are enjoyed.

(33) Conversely, when market conditions are such that competing undertakings have enough capacity and find it profitable to increase output sufficiently, it does not seem possible that the merger will significantly decrease competition by creating or strengthen a dominant position. However, it is unlikely that competing undertakings will increase production amount if they face capacity constraints and the expansion of capacity is costly or if existing excess capacity is significantly more costly to operate than capacity currently in use.

(34) Although capacity constraints are regarded as important for markets where goods are homogeneous, they may also be important for markets for differentiated products depending on the substitutability between products.

3.1.5. Merged Undertaking Has Enough Capacity to Hinder Expansion by its Competitors

(35) Some mergers may result in granting the merged undertaking a position where it will have the incentive to make the expansion of relatively smaller or potential competitors more difficult or restrict the ability of competitors to compete and encourage the merged undertaking's behavior to these ends. In such a case, competitors will not, either individually or together, be in a position to exercise pressure on the merged entity so that it will not increase prices or take other actions that may harm competition. For example, the merged undertaking may have such degree of control over inputs or distribution channels that expansion or entry by competitors may be more costly. Similarly, the merged undertaking's power based on patents or other types of intellectual property rights may produce the same results. In markets where interoperability between different infrastructures or platforms is important[9], a merger may give the merged undertaking the opportunity and incentive to decrease the quality of service or raise the costs of its competitors. In making assessments within this framework, the financial strength of the merged undertaking relative to its competitors should be taken into account, inter alia.

[9] Network industries such as energy and telecommunications are examples of such markets.

3.1.6. Merger Eliminates an Important Competitive Force

(36) Some undertakings have more influence on the competitive process in the market they operate than their market shares or similar indicators suggest. A merger involving such a firm may cause significant and anti-competitive changes on competitive dynamics of the market, in particular in case the relevant market is concentrated. For example, one of the merging parties may be an undertaking which has recently entered the market and which is expected to exert significant competitive pressure on the actual participants in the market in the future.

(37) In markets where innovation is an important competitive force, a merger may increase the merged undertaking's ability and incentive to bring innovations to the market, which may result in creating competitive pressure on competitors to offer innovations in that market or increase the current pressure. Alternatively, a merger between two innovators may significantly impede competition by creating or strengthening a dominant position. Similarly, an undertaking with a relatively small market is regarded as an important competitive force if it has promising products in progress.

3.2. Coordinated Effects

(38) Some market structures may make it possible, economically rational, and hence preferable for undertakings operating in that markets to adopt, on a sustainable basis, a behavior pattern aimed at making sales at high prices. A merger in a concentrated market may significantly impede effective competition, through the creation or strengthening of a joint dominant position because such a transaction increases the ability of undertakings to coordinate their behavior and increase prices without entering into an agreement or resorting to a concerted practice within the meaning of article 4 of the Act no 4054. A merger may make the current coordination stronger for undertakings which were already coordinating their behavior before the merger or enable them to coordinate on higher prices.

(39) Coordination may appear in various forms. In some markets, the most likely coordination involves keeping prices above the competitive level. In other markets, coordination aims at limiting production or the amount of new capacity brought to the market. Undertakings may

also coordinate for dividing the market according to geographic area or other customer characteristics, or by allocating contracts in bidding markets.

(40) Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination. In addition, sustainability of the coordination requires three conditions. First of all, the coordinating undertakings must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, there must be some deterrence mechanism that will be activated if deviation from coordination is detected. Third, the outsiders, such as current and future competitors that are not within the scope of the coordination, as well as customers, should not be able to jeopardize the results expected from the coordination.

(41) With respect to the analysis of whether it is possible to reach the terms of coordination and whether the coordination is likely to be sustainable, the changes that the merger brings about on the conditions of the relevant market should be revealed. The reduction in the number of undertakings operating in a market may be a factor that facilitates coordination. A merger may increase the likelihood or significance of coordinated effects in other ways. For instance, one of the merging parties may be a maverick firm that has a history of preventing or disrupting coordination by not following price increases by its competitors, or having an incentive to making different strategic choices than its coordinating competitors prefer. In case the merged undertaking adopts strategies similar to those of other competitors, the remaining undertakings will be able to coordinate more easily, and the merger will increase the likelihood, sustainability or effectiveness of coordination.

(42) In assessing coordinated effects, all available data related to the characteristics of the relevant market, including past behavior of undertakings and structural features of the market, should be taken into account. Evidence of past coordination in the relevant market is important if the characteristics of the relevant market have not changed appreciably or are not likely to do so in the near future. Evidence indicating coordination in similar markets may provide useful information, as well.

3.2.1. Reaching a Common Understanding about the Terms of Coordination

(43) In case the competitors arrive at a common perception as to how the coordination should work easily, coordination will be more facilitated. It is important for reaching an understanding that coordinating firms should have similar views regarding which actions will be taken be in accordance.

(44) The less complex and the more stable the economic environment in the relevant market is, the easier it is for the undertakings to reach a common understanding on the terms of coordination. For instance, coordination is easier and more likely in a market where few undertakings are operating compared to a market with many undertakings. It is also easier to coordinate on price in a market for a single and/or homogeneous product, than a market with many and/or differentiated products. Similarly, it is easier to coordinate on price when demand and supply conditions are more stable than when they are continuously changing. In this context, volatile demand, substantial internal growth by some undertakings in the market or frequent entry by new undertakings indicates that the current condition of the market is not sufficiently stable to make coordination possible. In markets where innovation is important, coordination is more difficult since especially substantial innovation gains give an undertaking significant advantages over its competitors.

(45) Coordination by way of market division will be easier if customers have similar characteristics as the coordinating undertakings will allocate them easily in this case. Such characteristics are defined on geographic location or type of the customer concerned or the fact that the customer concerned frequently buy from one specific undertaking. Coordination by way of market division is easier when it is easy to identify each customer's supplier and customers are allocated among their incumbent suppliers.

(46) Coordinating undertakings may resort to other ways to overcome problems stemming from the complexity of the economic environment apart from market division. For instance, they may reduce the complexity of coordinating on a large number of prices by establishing simple pricing rules. One example of this type of rule is reducing the coordination problem by establishing a small number of pricing steps. Another example is establishing a fixed relationship between certain base prices and a number of other prices and ensuring that the

prices in question move in parallel. Publicly available key information, exchange of information through associations of undertakings, or information received through cross-shareholdings or joint ventures may also help reaching coordination. The more complex the conditions of the relevant market are, the more transparency or communication is needed to reach a common understanding on the terms of coordination.

(47) The more the undertakings in the relevant market have symmetric structure in terms of cost structures, market shares, capacity levels and levels of vertical integration, the easier it is for them to reach coordination. Structural connections such as cross-shareholdings or participation to joint ventures are among factors that encourage undertakings to align their behavior.

3.2.2. Detecting Deviations from Coordination

(48) It is often an attractive choice for coordinating undertakings to increase their market share by deviating from the terms of coordination, for instance through lowering prices, offering secret discounts, increasing quality or capacity or trying to win new customers. Credible threats including timely and sufficient retaliation may prevent undertakings from deviating. Therefore, the relevant market must be sufficiently transparent to allow the coordinating undertakings to detect those deviating from the common strategy and to retaliate in time if necessary.

(49) The lower the number of undertakings operating in the market is, the higher the transparency in that market is. Moreover how transparent a market often depends on how transactions take place in that market. For example, transparency is expected to be higher where transactions take place on a public exchange or in an auction. On the contrary, transparency is low in markets where transactions are made confidentially through bilateral negotiations between buyers and sellers. The key element in evaluating the level of transparency in the market is to show to what extent undertakings can get information about the actions of other undertakings from the information available to them. Coordinating firms should be able to interpret with some certainty whether unexpected behavior or situation in the relevant market is the result of deviation from coordination. For instance, in unstable environments it is difficult to know whether a loss in an undertaking's sales is due to an overall reduction in demand or due to low prices offered by a competing undertaking. Similarly, when there are fluctuations in overall demand or cost conditions it is difficult to detect deviations from coordination because the

reduction in prices may stem from changes in demand and costs or a deviation from coordination.

(50) In some markets where it is difficult to detect deviations, undertakings may still engage in practices which have the effect of facilitating monitoring, even if they do not intend to do so. These practices, such as information exchange through associations of undertakings, announcements about price, etc., voluntary publication of certain information, most-favored-customer clauses or meeting-competition may increase transparency or help evaluation related to undertakings' choices. Cross-directorships in more than one undertaking, participation in joint ventures and similar agreements are among factors that make monitoring mechanism easier.

3.2.3. Deterrent Mechanisms

(51) Coordination cannot be regarded as sustainable unless coordinating undertakings are convinced that that it is in their best interest to adhere to the terms of the common strategy that they will follow together with their competitors among other opportunities. Sustainability of the coordination among competitors depend on the credibility of the retaliation mechanism that can be activated by other undertakings against those deviating from coordination.

(52) It is unlikely that retaliation which appears with significant delay or is not certain to be activated will offset the benefits from deviating from common strategies. For example, if transactions in the relevant market are realized on a large-scale and infrequent basis, it will be difficult to establish sufficiently severe deterrence mechanisms since the gains from deviating at the right time may be certain, immediate and large whereas the losses to be born due to deterrence mechanisms will be small and materialize with delay. The speed with which deterrent mechanisms can be implemented is mainly related to transparency. If undertakings are only able to observe their competitors' actions after a substantial delay, the retaliation mechanisms will also be implemented with delay and this will influence whether deviations will be sufficiently deterred.

(53) The credibility of deterrence mechanisms before undertakings depends on whether the other coordinating firms have an incentive to retaliate against any deviation. Some deterrence

mechanisms, such as punishing the undertaking that deviates from the common strategy by temporarily engaging in a price war with it or increasing output significantly, cause short-term economic losses for the retaliating undertakings. This may not remove the incentive to retaliate since short-term losses may be smaller than the benefits to be gained in the long term as a result of returning to coordination due to retaliating.

(54) Retaliation does not have to take place in the same market as the deviation. When coordinating undertakings have commercial interaction in other markets, it will be possible to apply various methods of retaliation. Retaliation could take many forms, including cancellation of joint ventures or other forms of cooperation or selling of shares in jointly owned companies.

3.2.4. Reactions of Outsiders

(55) The success of the coordination depends on the condition that the reactions of non-coordinating undertakings and potential competitors, as well as customers, do not jeopardize the outcome expected from the coordination. For example, if coordination aims at reducing overall capacity in the market, consumers will be hurt only if non-coordinating firms are unable or have no incentive to respond to by sufficiently increasing their own capacity to prevent the ultimate decrease in total capacity, or at least to render the capacity decrease unprofitable.

(56) The effects of entry to the relevant market and countervailing buyer power of customers on the sustainability of the coordination must be analyzed. For instance, a large buyer which meets a large amount of its requirements from one supplier or offers long-term contracts to its suppliers may make coordination unsustainable by tempting one of the coordinating firms to deviate from coordination and make huge gains.

3.3. One of the Merging Parties is a Potential Competitor

(57) A merger between an undertaking already active in the relevant market and a potential competitor may have similar anti-competitive effects to a merger between two undertakings already active.

(58) A merger with a potential competitor can generate horizontal anti-competitive effects, in the form of bilateral or coordinated effects if the potential competitor exercises significant

competitive pressure on the undertakings already active in the market. This is the case if the potential competitor possesses assets which it can forward to the market without incurring significant sunk costs. Anti-competitive effects may also occur where one of the parties is very likely to incur the necessary sunk costs to enter the relevant market in a short period of time and this entry would exercise competitive pressure on the undertakings in the market.

(59) In order for a merger with a potential competitor to significantly impede competition by creating or strengthening a dominant position, two basic conditions must be fulfilled. First, the potential competitor must already be exerting a significant competitive pressure on market participants or there must be a significant likelihood that it will turn into an effective competitive force. The plans of the potential competitor to enter the relevant market in a short time are notable indicators in this sense. Second, there must not be a sufficient number of other potential competitors to maintain sufficient competitive pressure after the merger.

3.4. Mergers Creating or Strengthening Buyer Power in Upstream Markets

(60) To what extent a merger will create buyer power on suppliers in upstream markets at the same time is one of the important issues to be taken into account in the competitive analysis. A merger may significantly impede effective competition by creating or strengthening a dominant position by a buyer in the upstream (purchasing) market. The merged undertaking may reduce the quantity of inputs it purchases and obtain those inputs at lower prices. However, this will lead to a reduction in the level of output in the final product market, and thus harm consumer welfare. Such condition is more likely to arise when the upstream market is relatively fragmented in particular with respect to sellers. In case the merged undertaking limits the access of its competitors to inputs by using its buyer power, competition in the downstream markets may also be adversely affected.

(61) On the other hand, an increase in the buyer power may be beneficial for competition. An increase in the buyer power may lower input costs without restricting competition in the downstream market. Consequently, prices may be lowered for the benefit of consumers.

4. COUNTERVAILING BUYER POWER

(62) Not only competitors but also customers may exert competitive pressure on a supplier. If the customers have significant buyer power, even undertakings with very high market shares will not be able to be in a dominant position. In other words, they will not have the power to determine economic parameters such as price, supply, production and distribution amounts by acting independently of their competitors. In this context, countervailing buyer power should be understood as the bargaining strength that they gain vis-à-vis the seller in commercial transactions due to their size, significance for the seller and ability to switch to alternative suppliers.

(63) The Board will consider how customers will counter the increase in market power that a merger will create. Buyer power will be at issue if customers could threaten to resort to alternative suppliers within a reasonable time frame in case the supplier increases prices or lower the quality of products. This is the case where customers issue a threat to switch to other suppliers in a short time or to vertically integrate and be active in the upstream market or threaten to encourage new entries to supplier's market by switching large orders to another undertaking planning to enter the upstream market. Buyer power may be exercised by refusing or delaying the purchase of other products offered by the supplier.

(64) Whether the customers have an incentive to use their buyer power may be important in some cases. For example, customers' desire to encourage a new entry by a supplier to the upstream market will diminish if lower input costs provided by such entry could also be reaped by their competitors in the downstream market.

(65) It is not possible to indicate countervailing buyer power which offsets anti-competitive effects of a merger in case only a particular segment of customers with bargaining strength is shielded from significantly higher prices created by the merger. Moreover, it is necessary that the buyer power should exist not only prior to the merger but also after the merger since the buyer power of customers will be reduced afterwards, if a merger of two suppliers removes an important alternative source of supply.

5. ENTRY

(66) When entry to a market is sufficiently easy, the risk that mergers will produce anti-competitive effects will be low. Therefore, entry analysis is one of the important elements of the overall competitive assessment. For entries to exert sufficient competitive pressure on the merging parties, they must be likely, timely and sufficient.

5.1. Likelihood of entries

(67) While assessing the competitive effects of mergers, the Board examines whether entry is likely or whether potential entries prevent anti-competitive behavior of the undertakings in the market. For entry to be likely, it must be sufficiently profitable taking into account the increase in the amount of sales created by the entry and the potential responses of the undertakings active in the market. Entry is not possible in cases where large-scale facilities need to be established for an economically profitable entry because such large-scale entries will repress the actual prices downwards. In addition, entry is more unlikely if the undertakings in the market offer long-term contracts to protect their market shares or giving price reductions to those customers that are the target of the entrant. When risks and costs to be incurred if the entry fails are high, the possibility of entry to those markets will be less likely.

(68) Potential entrants may encounter entry barriers which determine entry risks and costs and thus determine the profitability of entry. Entry barriers are advantages that incumbent undertakings have over potential entrants and that stem from the characteristics of the market. In case entry barriers are low, new entries may prevent merging parties' anti-competitive behavior. On the contrary, when entry barriers are high, the merging undertakings' incentive to increase prices will not be prevented. Analyzing a market in terms of past entry and exit may provide important information about the size of entry barriers.

(69) Entry barriers can take various forms:

(a) There may be legal entry barriers. For instance, a regulatory authority may restrict the number of licenses and thus the number of market participants. They may also take the form of tariff and non-tariff trade barriers.

(b) Incumbent undertakings may enjoy technical advantages over new entrants by having essential facilities, natural resources, innovation and R&D or intellectual property rights. For instance, in certain industries, it might be difficult to access essential input materials or intellectual property rights or procedures may be protected. Economies of scale and scope, distribution and sales networks or restrictions to access to important technologies are other types of entry barriers.

(c) The current position of an incumbent undertaking may also constitute an entry barrier. For instance it will not be easy to enter markets where experience and reputation is important, both of which are difficult to obtain for an entrant. In this context, factors such as consumer loyalty to a particular brand, the close relationships between actual suppliers and customers, the importance of promotion and advertising and other issues that may affect an undertaking's reputation may be taken into account. Entry barriers may arise where the incumbent undertakings are able to put large excess capacity into use or where customers have to incur significant costs if they switch to a new supplier.

(70) When assessing whether or not entry would be profitable, possible changes to the market are taken into account. Entry to a market that is likely to grow in the future is more likely to be profitable than entry to a market that has a potential to decline. Unless the entrant can obtain a sufficiently large market share, scale economies or network effects may prevent new entries from being sufficiently profitable.

(71) If the equipment and technologies used by undertakings active on other markets can easily be used in the market where the merger concerned takes place, entry will be easy as the sunk costs will be low.

5.2. Timeliness of Entries

(72) The Board examines whether entry is sufficiently rapid to prevent the exercise of market power in an anti-competitive way. Whether an entry is rapid depends on the characteristics and dynamics of the market, as well as on the specific capabilities of a potential entrant. However, the entry is considered timely if it normally occurs within two years.

5.3. Sufficiency of Entries

(73) An entry must have the sufficient power and scope to eliminate the anti-competitive effects of the merger. For instance, a small-scale entry to a narrow segment of the market will not be sufficient to eliminate the anti-competitive effects of the merger.

6. EFFICIENCIES

(74) Mergers may be a requirement of competition and there is a possibility that competition will increase as a result of such transactions. Efficiency gains brought about by a merger may counteract its harm on competition and consumers. The Board performs an overall assessment when examining a merger and take into consideration technical and economic developments which benefit consumers and which do not harm competition.

(75) The Board considers efficiency claims by the parties in its competitive assessment and authorizes the merger if it finds them realistic. This is the case if the new undertaking created after the merger has an incentive to act more competitively for the benefit of consumers.

(76) In order for a merger to be authorized by considering efficiency gains, the efficiencies to be gained have to benefit consumers, be specific to the merger under examination and be verifiable.

6.1. Benefit to Consumers

(77) The main criterion in assessing efficiency gain claims is that consumers will not be in worse conditions as a result of the merger compared to pre-merger situation. In order to meet that criterion, efficiencies should be substantial, timely and should benefit consumers in markets where competition concerns exist.

(78) Mergers may provide efficiency gains that can lead to benefits for consumers, especially lower prices. For example, cost advantages in production or distribution may give the merged undertaking the opportunity to charge lower prices from consumers. Mergers that lead to reductions in variable or marginal costs meet more easily the criterion of benefiting consumers

than those that lead to reductions in fixed costs. Cost reductions resulting from anti-competitive reductions in output in the market cannot meet that criterion.

(79) Consumers may also benefit from new or improved products or services launched by means of efficiency gains in the sphere of R&D and innovation. For instance it is likely that a joint venture company set up in order to develop a new product will meet the criterion of benefiting consumers.

(80) Efficiency gains may have an effect that will reduce the risk of anti-competitive coordination between undertakings in the market. The new undertaking will have the opportunity to lower its prices and increase its sales amount thanks to the efficiency gains resulting from the merger, thus it will not find involving an anti-competitive act with other undertakings profitable.

(81) The longer the time period in which efficiencies are materialized is, the less importance and weight the Board assigns to them. In other words, in order to be considered as a countervailing factor against anti-competitive effects, the efficiency gains should not take a long time to be realized.

(82) Whether efficiency gains will be passed on to consumers depends on the degree of competitive pressure on the undertaking to be created as a result of the merger exerted by other undertakings active in the market or by new entries. The greater the negative effects on competition created by a merger are, the greater the efficiency gains that must be realized and passed on to consumers should be. Therefore, it is highly unlikely to provide, as a result of any merger, efficiency gains that are sufficient to countervail the anti-competitive effects of a merger leading to a monopoly or the acquisition of a market power approaching that of a monopoly.

6.2. Merger specificity

(83) In order for efficiency gains to be considered as a countervailing factor against anti-competitive effects, they must be a direct consequence of the merger under examination and cannot be achieved by another, less anti-competitive transaction. It is for the parties of the merger under examination to prove in due time that there are no less anti-competitive concentrative transaction (for instance another merger) or non-concentrative transaction having the same

characteristics (for instance a licensing agreement). The Board will only consider alternatives that are reasonably practical having regard to the realities of the market.

6.3. Verifiability

(84) Efficiency gains have to be verifiable by the Board. In other words, the Board must be sufficiently convinced that the efficiency gains claimed will absolutely be materialized and be adequate in terms of scope to countervail anti-competitive effects. The more precise the efficiencies demonstrated by the parties concerning efficiency gain claims are, the more convinced the Board will be and thus include those points into its assessment. Therefore efficiency gains and likely benefits to consumers should therefore be demonstrated in a quantitative way as much as possible. When the necessary digital data are not available to demonstrate efficiency gains quantitatively, parties may make an estimation about the size of the efficiency gains. However, these estimations should be identifiable by the Board. The board will not take into account efficiency gain claims that are marginal, exaggerated and baseless.

(85) Information showing whether efficiency gains that will enable the Board to authorize the merger is generally in the possession of the merging parties. Therefore the burden of proof to demonstrate that the claimed efficiencies are merger-specific and they benefit consumers is on merging parties.

(86) Evidence supporting efficiency claims includes, in particular, internal documents that were prepared by the management before the merger, reports prepared for partners or financial markets or results regarding similar issues from past example cases.

7. FAILING FIRM DEFENSE

(87) The Board may clear a merger that creates anti-competitive effects if one of the merging parties is a failing firm. The basic requirement is that the decrease in competition level in the market after the merger is not the result of the merger. In other words, if competition would be decreased in the absence of the merger at least as the same extent as when the merger is allowed, it means that this basic requirement is fulfilled.

(88) The Board uses the following three criteria assessing the failing firm defense: First, the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking. Second, there is no less anti-competitive alternative way than the merger under examination. Third, if the merger is not cleared, the assets of the allegedly failing firm would inevitably exit the market.[10] It is for the merging parties to demonstrate that those three criteria are fulfilled concerning the merger.

[10] The first criterion implies exit by the allegedly failing firm without being subject to an acquisition and thus a decrease in the number of market participants; the third criterion implies the assets (equipment pool, brand, commercial credit) owned by the firm will exit the market.